

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
AIR AND WASTE MANAGEMENT

Mr. Edward Merrigan  
Smathers & Merrigan  
888 17th Street, N.W.  
Washington, D. C. 20006

Dear Mr. Merrigan:

As a result of our conversation and the concern I have for the proper resolution of the freight rate and NEPA issues in U.S. v. S.C.R.A.P., I initiated an effort to have EPA submit an amicus curiae brief. This effort culminated in a draft brief and a request from EPA's Office of General Counsel to the Solicitor General for permission to file a brief. This request was refused primarily because EPA's views on the matter are well known to the Court (see the enclosed correspondence). I regret that EPA will not have the opportunity to give a stronger indication to the Court of its position on these issues.

Please notify me when oral argument is scheduled.

Sincerely,

/s/ ARSEN J. DARNAY

Arsen J. Darnay

*Deputy Assistant Administrator for  
Solid Waste Management Programs  
(AW-562)*

OFFICE OF THE SOLICITOR GENERAL  
WASHINGTON, D.C. 20530

February 6, 1975

Robert V. Zener, Esq.  
General Counsel  
United States Environmental  
Protection Agency  
Washington, D.C. 20460

Re: United States, et al. v. S.C.R.A.P., Nos. 73-1966  
and 73-1971, October Term, 1974

Dear Mr. Zener:

I have your letter of February 4, 1975, requesting that the Environmental Protection Agency be authorized to file a separate *amicus curiae* brief in the above case stating EPA's views.

While I understand your views in this matter, it appears EPA has no independent regulatory authority in regard to the actions of the Interstate Commerce Commission involved in this case. Rather, EPA's role was to comment on the ICC's draft environmental impact statements and that was done here. EPA's comments are part of the record and are reprinted in the Joint Appendix. Moreover, counsel for the appellees has relied upon EPA's views in arguing that the ICC did not adequately respond to the comments of EPA and other agencies of the federal government.

Therefore, for these and other reasons discussed with you by telephone, I must respectfully refuse your request for authorization to file a separate *amicus curiae* brief in this case.

Sincerely,

/s/ ROBERT H. BORK  
Robert H. Bork  
Solicitor General

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

February 4, 1975

OFFICE OF  
ENFORCEMENT AND GENERAL COUNSEL

Honorable Robert H. Bork  
*Solicitor General*  
Department of Justice  
9th & Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Bork:

Re: United States (Interstate Commerce Commission),  
et al. v. S.C.R.A.P., Nos. 73-1966 and 73-1971

I am requesting permission to submit to the Supreme Court the views of the Environmental Protection Agency regarding certain aspects of the above-captioned case. The interest of this Agency in the case stems from our role under the National Environmental Policy Act and the Guidelines of the Council on Environmental Quality in the environmental impact statement process. Specifically, NEPA requires the federal agency proposing a major federal action significantly affecting the environment to obtain comments from the appropriate federal agencies prior to preparing an environmental impact statement. EPA is frequently involved in this comment process. In our view, this commenting process is meaningless unless the federal agency proposing action is required to make an adequate response to the other agency comments. The Environmental Protection Agency is of the opinion that the environmental impact statement of the Interstate Commerce Commission in Ex Parte No. 281 does not meet the requirements of Section 102 (2)(C) of the National Environmental Policy Act.

In particular, EPA believes that the Commission has failed to provide a reasonable evaluation of and an adequate response to a number of serious criticisms which sev-

eral federal agencies have levied against the Commission environmental impact statement. This failure of analysis deprives the final impact statement of thoroughness and objectivity and strongly suggests that the NEPA procedure followed by the Commission lacked the requisite "good faith", "hard look" at the environmental implications of a general increase in rail transportation rates for recyclable materials. The Commission's evaluation in response to agency comments is inadequate in the following three areas:

- (a) The impact of the proposed changes in transportation costs on the demand for recyclables;
- (b) The impact of the proposed rate increase on capital investment in the recycling industry;
- (c) Reasonable alternatives to a general rate increase on recyclables.

Following is a detailed discussion of these points.

EPA, as early as April 24, 1972 in its letter to the Commission, and the Department of Commerce in responding to the draft environmental impact statement, pointed out that the Commission should conduct an economic evaluation on the responsiveness of the demand for secondary materials to changes in transportation costs. It was suggested that such a study consider the cumulative impact of several rate increases as well as the specific impact of the proposed general increase. (Appendix, pp. 572-579)

The major response of the Commission has been to cite limited historical data showing that the demand for recyclables has continued despite past increases in rail rates. This response is inadequate because it is clear that the demand for recyclables is affected by several factors besides transportation costs. It is erroneous to observe the aggregate effect of all pertinent factors (in this case, continued demand for recyclables commensurate with increasing rail rates), yet to conclude without economic analysis that one factor (transportation rates) has no effect. Such evalua-

tion is fallacious, and might just as well lead to the incorrect conclusion, because the demand for non-recyclables has been increasing in the face of rail rate increases, that transportation costs play no role in determining the demand for these materials.

The Commission also responded to EPA's recommendation by merely identifying factors which would have a greater influence on the demand for recyclables than transportation costs. The Commission has conducted no detailed evaluation or quantification of the extent to which transportation costs may affect demand. The Commission has essentially asserted in conclusory fashion that because factors other than transportation costs are the most important determinants of product demand, it need not perform substantive economic analysis on the effect of a rate increase. For example, the Commission stated that because the demand for ferrous scrap metal is related to the total amount of steel produced, the elasticity of demand studies recommended by EPA are unnecessary. Here, too, the Commission's effort to comply with NEPA is superficial, consisting of the economically unsound proposition that because a variety of factors influence the demand for recyclables, reliable evaluation and quantification of the effect of one factor, rail rates, is unnecessary. An objective inquiry into the impact of the rate increase requires at minimum an economic analysis sufficiently detailed to establish a supply-demand curve for each major secondary commodity.

Finally, the inadequacy of the Commission's response to agency comments in this regard is indicated by its apparent lack of conviction in its own limited economic evaluation. While opining that the rate increase will have no impact on the demand for secondary materials, the Commission is simultaneously "holding down" the rate increase on recyclables other than ferrous metal, in the belief that such action "should encourage the movement and recycling of commodities." (Appendix, p. 574).

Similarly, in Ex Parte 295, as to certain scrap commodities, the Commission has reached conclusions contrary to those of its cursory analysis in Ex Parte 281. Thus, in Ex Parte 295 the Commission has recently concluded as to a 3% rate increase on nonferrous scrap:

“[An estimated [additional] 3,097 tons of metal will be annually required from virgin ores. An increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year. (ICC, Final Environmental Impact Statement, Ex Parte 295, Increased Freight Rates and Charges, 1973—Recyclable Materials p. 2-13.).

With respect to iron and steel scrap, the Commission now says that a rail freight increase of 3 per cent on scrap being transported for recycling will result in:

“an expected annual decrease in recycled scrap of . . . 67,000 tons . . . , resulting in additional mining requirements for 156,000 tons of domestic ore, 58,300 tons of coal and 14,700 tons of limestone and dolomite. The processing of additional ore is expected to require an increase of 324 thousand megawatt hours; increased pollutants emitted are estimated as 4,500 tons (on a controlled basis).” (p. xiv)

Moreover, the Commission now acknowledges that:

“In the long term, the effect of the proposed 3 per cent rate increase will be to perpetuate and increase any inequities that may exist in the rail freight structure between primary and secondary commodities. Such an effect applies particularly to waste paper and to non-ferrous metals for which the Interstate Commerce Commission has computed differentials in favor of primary materials. [,]” (p. xv-xvi)

and that:

“to the extent that [the proposed 3 percent rate increase] decreased the movement of scrap and brought

about a corresponding increase in the consumption of virgin metal, there may be adverse effects on the environment . . . , relating not only to accumulation of solid waste but also to the secondary consequences of resource consumption, higher level of pollutants discharged during processing, and—most of all—greatly increased demands for energy: (p. 2-3)

“In this connection, strong arguments can be made, generally and qualitatively, that by increasing the total costs of recycling, raising the rail freight rates will significantly decrease scrap reclamation.” (p. 2-19)

A second area of agency comments concerns the necessity for determining whether the proposed rate increase, in its cumulative effect over the long-term, could deter investment in the recycling industry. On the one hand the lack of capital investment in the recycling industry adversely affects the demand for recyclables. Yet because the Commission has failed to determine the importance of transportation rates to the long-term demand for recyclables, it cannot adequately evaluate the impact of a rate increase on capital investment. Such an impact, were it to occur, could in turn reduce the long-term demand for recyclable commodities.

The importance of such a determination is illustrated by one example involving the Commission's finding that electric arc furnaces are expected to produce a growing percentage of the nation's total steel output. These furnaces are not integrated to the ore mining industry and can utilize nearly 100% ferrous scrap. Understanding whether the rate increase would impede the commercial development of such furnaces is necessary in order to evaluate thoroughly the environmental implications of the rate increase.

The Commission also failed to respond adequately to agency comments suggesting an analysis of alternatives

to the proposed rate increase. CEQ and EPA commented that an assessment of the necessity for the proposed rate increase and an evaluation of alternatives entails understanding the extent to which the current rates are cost-based. (Appendix, pp. 705, 708) The feasibility of any rate "hold-down" as an alternative would in part be determined by the degree to which the current rates are cost-based. In particular CEQ and EPA requested a determination of whether secondary materials make a proportionally greater contribution to railroad costs than do competing virgin materials.

The General Services Administration also criticized the draft impact statement for failing to analyze the feasibility of a rate "hold-down" as an incentive to more recycling. (Appendix, p. 597). The Department of Commerce similarly pointed out that the Commission had yet to evaluate the impact of a rate increase on a rate structure which provides little or no incentive for transporting environmentally charged materials. (Appendix, p. 578).

The Commission's response to all proposals that the alternative of a rate "hold-down" be explored consisted primarily of a dissertation on ICC rate-setting criteria. (Appendix, pp. 213-236). Such a discussion contributed nothing toward answering the questions posed. The Commission has yet to indicate what portion of the transportation rates and the rate increase is attributable to railroad cost, what portion is allocable to non-cost characteristics and whether recyclables are contributing a proportionally greater share to railroad costs.

Without knowing what shipping costs are it is most difficult to weigh the environmental effects of shipping greater or lesser amounts of scrap against the cost of providing the services. Evaluating the feasibility of a major alternative, a "rate holdodown", is therefore impossible. As the Department of Commerce stated in reviewing the



Commission's draft environmental statement, "There is need for solid independent analysis that considers new economic realities." (Appendix, p. 573).

Such superficial response to agency recommendations is illustrated by the Commission's reply to CEQ's suggestion that a "hold-down" on rates for recyclables be imposed pending adequate evaluation of the environmental impact of the rate increase. The Commission stated that such would be "wholly at odds with the achieving of a cost-related pricing structure." (Final EIS, at p. 190). Yet when presented with EPA's proposal to determine whether the rate increase for each commodity was cost justified, the Commission responded that such an evaluation was "so far out of line with the fabric of rate regulation in America that the proposal could not have been considered a practical alternative." (Final EIS, p. 194).

Furthermore, EPA suggested that several other alternatives to a general rate increase be investigated, including the establishment of incentive loading rates (similar to non-ferrous schedules already implemented), improved loading methods, more efficient car designs, and more efficient scheduling. (Appendix, p. 711). Yet, the Commission, while conceding that the railroad industry has tended to cling to all too many inefficient and uneconomical practices, asserted as its singular evaluation of the proposed alternatives that it does not "believe" such requirements can bring about more efficient carrier management. (Final EIS, p. 199).

In conclusion, it is EPA's view that the Commission's response to these and other important agency recommendations reflects a shallow evaluation of the environmental impacts of and the alternatives to the proposed rate increase on recyclables. As the Department of Interior noted of the Commission impact statement, "... instead of an impact appraisal, the main thrust of the discussion

is the justification of increased rail freight rates." (Appendix, p. 703). Such an impact statement does not, in EPA's opinion, comport with the "good faith reasoned analysis" required where comments of "sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives." *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir., 1973).

Sincerely,

/s/ ROBERT V. ZENER  
Robert V. Zener  
General Counsel